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Obama Already Won on Net Neutrality

The president's view is going to prevail, so he should back legislation rather than an FCC ruling.



Big winner in the net neutrality debate.

By [Ev Ehrlich](#) | Jan. 21, 2015 | 8:00 a.m. EST

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President Barack Obama is about to score his biggest policy coup since health insurance reform. Mere weeks after he suddenly and startlingly called for the reclassification of Internet as a “Title II” service under the 1996 Telecommunications Act (meaning it could be regulated as was the Bell phone system), a bipartisan coalition is now constructing a compromise that will make how the White House wins this fight even more important than if or when.

At issue is “paid prioritization” – whether content that so wishes can travel the Internet’s backbone maze faster than others. A court ruled last year that the Federal Communications Commission didn’t have the right to ban this practice. But it would have that right if it “reclassified” the Internet as described above. The debate over this issue has been had and needn’t be perpetuated here. In fact, it’s irrelevant now. The president’s view is about to prevail, one way (an FCC ruling) or the other (a Congressional compromise).

Why have events changed so quickly? The obvious answer is that the president has the cards. Three Democratic FCC commissioners are prepared to enact reclassification, albeit with “forbearance,” meaning they swear never to use other powers inherent in reclassification, like outright price controls. The Republican congressional majorities might disagree, but the president’s veto pen is the ace of trump.

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A second reason why paid prioritization is facing elimination is that technology is making it less relevant. Sure, you need a premium signal for the tasks that require uninterrupted, interactive, high-speed connections – gaming, remote medicine, self-driving cars, and so on. But the Internet's growing speed and strength make such "elite" applications evermore rare; the vast bulk of what we do on the Internet today occurs on terms that are perfectly fine. Opponents spoke of Internet "slow lanes," a calumny equal to that of "death panels" six years ago. In fact, the Internet is so much faster today that "non-premium treatment" would still be among the fastest connections in the developed world.

And, finally, big websites like Netflix and Google, which feared that prioritization would force them to pay for the congestion they create, are pursuing a different strategy: building or contracting their own networks that are as good as "prioritization." These sites may prefer cutting deals with carriers that give them such dedicated networks, which preserve their competitive advantages over smaller firms, but avoid the appearance of a "non-neutral" Internet they opposed (and whose cause they financed).

So the time may now be right to end the neutrality debate, meaning the administration has won. But it now needs to pay attention to the way it wins, which brings us to the compromise now reported to be moving through Congress. It would expressly permit the FCC to ban paid prioritization without having to take on the burden of Title II reclassification. And as the compromise is being forged, the administration is deliberating whether it should support it. It should, for a variety of reasons.

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First, despite the enthusiasm for reclassification, saying that the Internet is "just like" the old telephone system fails on a prima facie basis the test implied in Frank Zappa's dictum, "a cow don't make ham." It's obviously not, and there's now decades of law supporting the distinction. An FCC ruling to the contrary may create a maelstrom in the courts that lasts years.

Second, as the reclassification push itself proves, the FCC can always turn on a dime down the road. Advocates for reclassification should consider whether the next FCC – perhaps in a Republican administration – scuttles this decision. A Congressional compromise, in contrast, would be far harder to reverse.

Third, the more decisions we move away from regulators and to the Congress, the better. The former lack the full legitimacy only the Congress can convey, and lead to greater legal maneuvering and political posturing.

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But perhaps the most important benefit conveyed by such a compromise is the opportunity it conveys. The 1996 Telecommunications Act was a rare act of bipartisan political maturity. A compromise resolving the "net neutrality" debate could provide a springboard for a new, bipartisan look at the 1996 law. If paid prioritization is taken off the table, then it's possible to imagine a bill that limits telecom regulation to where there's an actual show of harm, that lets the Internet "backbone" retain its free-wheeling and hyper-competitive character, that takes specific steps to close the digital divide and accelerate the national build out, including integrating our schools and health care facilities, and even allowing prioritization when there is a clear demonstration of public interest.

That's the administration's choice. Does it want some telecom heads to sit on pikes, Prince Joffrey style, or does it want to push the bipartisan process forward in a way that provides two decades of growth and innovation equal to those the 1996 law unleashed? That's the choice it faces.

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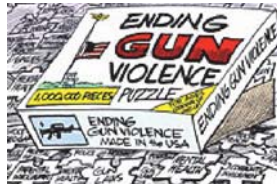


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